

LAWRENCE v. TEXAS (2003)

BACKGROUND

Houston Police, who were legally entitled to enter John Geddes Lawrence's home, found him engaging in anal sex with Tyron Garner. Lawrence and Garner were arrested and later convicted of violating Texas's anti-homosexual-sodomy statute prohibiting "deviate sexual intercourse with another individual of the same sex". Both were fined and compelled to pay court costs.

Lawrence and Garner appealed the verdict to the State Court of Appeals, claiming that the Texas statute violated their rights under the DP Clause and the EP Clause of the 14th Amendment. Following *Bowers*, the Texas Court of Appeals denied the appeal. The US Supreme Court then granted cert to resolve three issues:

Whether the statute runs afoul of the DP Clause
Whether the statute runs afoul of the EP Clause
Whether *Bowers* should be overruled

A DIVIDED COURT

Five Justices (Kennedy, Stevens, Souter, Ginsburg, and Breyer) found that the Texas statute runs afoul of the DP Clause, and that *Bowers* should be overruled. They did not think it necessary to consider whether the statute runs afoul of the EP Clause.

O'Connor concurred in the judgment, arguing that the Texas statute runs afoul of the EP Clause. But she did not think that the statute runs afoul of the DP Clause, and did not think there was sufficient reason to overrule *Bowers*.

Three Justices (Scalia, Rehnquist, and Thomas) argued in dissent that, following *Bowers*, the Court should have upheld the constitutionality of the Texas statute under the DP Clause and EP Clause.

KENNEDY'S OPINION: DUE PROCESS

Precedents

Griswold (1965): Right of married persons to make certain decisions regarding sexual conduct (relevant to the use of contraceptives) is part of the right of privacy protected by the DP Clause.

Eisenstadt (1972): The same right extends to unmarried persons.

Roe (1973): Right of a woman to make “certain fundamental decisions affecting her destiny” (relevant to the procurement of an abortion) is part of the right of privacy protected by the DP Clause.

Bowers (1986): There is no right of homosexual sodomy protected (as an aspect of the right to privacy) by the DP Clause.

Casey (1992): Re-affirmed the central holding of *Roe*, finding that “matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment”, and that this liberty includes the “right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”.

The doctrine of *Stare Decisis* (fidelity to precedent) suggests that *Bowers* is controlling, and therefore the Texas anti-homosexual-sodomy statute should be upheld. But this doctrine is not an “inexorable command”. There are circumstances, set out in *Casey*, that justify overruling prior cases.

The Casey doctrine of *Stare Decisis*

A rule R announced in a past case should be overruled if

- (a) R has been found to be unworkable, or
- (b) The law’s growth in the intervening years has left R a doctrinal anachronism,
or
- (c) Facts have so changed, or come to be seen so differently, as to have robbed R of significant application or justification,

as long as

- (d) R could be removed without serious inequity to those who have relied upon it or significant damage to the stability of society.

In this case, although (a) and (c) do not apply, (b) does. Moreover, (d) is satisfied.

(b) Doctrinal Anachronism: If the *Bowers* rule is seen against the *Griswold-Eisenstadt-Roe-Casey* background, it stands out as a doctrinal anachronism. For in all of these decisions there is recognition of a fundamental right of privacy protected by the DP Clause that includes the right to make decisions central to one’s personal dignity and autonomy. *Bowers* is the only decision in this period in which the Court asserted a rule (namely, that there is no fundamental right of

homosexual sodomy) that contradicts the general principle at the heart of the *Griswold-Casey* line of cases; so *Bowers* is a theoretical anomaly.

(d) Removal Without Inequity: The *Bowers* rule that anti-sodomy statutes do not run afoul of the DP Clause could be removed without serious inequity to those who have relied upon it or significant damage to the stability of society

It follows from the application of the *Casey* doctrine of *Stare Decisis* that the *Bowers* rule stating that anti-sodomy statutes run afoul of the DP Clause should not be upheld.

KENNEDY’S OPINION: EQUAL PROTECTION

Precedent

Romer (1996): Struck down an amendment to the Colorado Constitution that would have made it impossible for any Colorado municipality to pass laws protecting homosexuals from discrimination on grounds of sexual orientation. Found that the amendment was “born of animosity toward” homosexuals and therefore failed the Rational Basis test.

Principle

Although there is a “tenable” argument to be made (see O’Connor’s concurrence below) that Texas’s anti-homosexual-sodomy statute runs afoul of the EP Clause (by virtue of the fact that it treats similarly situated persons differently), merely striking down the Texas law on Equal Protection grounds would leave open the possibility that a law similar to the one upheld in *Bowers* (one that proscribed sodomy, whether engaged in by homosexuals, heterosexuals, bisexuals, or transgendered persons) would pass constitutional muster. But such a law would clearly make homosexual conduct criminal, and would thereby count as an “invitation to subject homosexual persons to discrimination both in the public and in the private spheres”. Moreover, the criminalization of homosexual conduct now (more than at the time *Bowers* was decided) has serious ramifications: (a) the offense would appear on one’s criminal record, and might affect an applicant’s chances of getting a job, and (b) there are at least 4 states that would require those convicted of engaging in sodomy to register as “sex offenders”.

O’CONNOR’S CONCURRENCE

O’Connor’s view is that it is the business of a judge to decide a case in a principled way that causes the least disruption to prior cases. Thus, if the dispute at hand can be resolved in a principled way without overruling a previous case, then this is what the Court should do.

The problem with the Texas statute is that it runs afoul of the EP Clause by virtue of the fact that it treats similarly situated persons differently.

The proper test to apply is Rational Basis review: the law should be rationally related to a legitimate state interest.

But there are different levels of Rational Basis review.

Ordinary Rational Basis Review has been applied to laws (such as economic regulations) that do not exhibit a desire to harm a politically unpopular group.

Heightened Rational Basis Review has been applied to laws that exhibit a desire to harm a politically unpopular group.

{Questions: What is the difference between heightened rational basis review and intermediate scrutiny? What is the difference between heightened rational basis review and strict scrutiny? Does heightened rational basis review now represent a FOURTH test, in addition to ordinary rational basis review, intermediate scrutiny, and strict scrutiny?}

Texas argues that the anti-homosexual-sodomy statute satisfies rational basis review because it is a rational means of achieving a legitimate state purpose, namely “the promotion of morality”.

But in this case the promotion of morality takes the form of “moral disapproval of a group”, and such moral disapproval, “like a bare desire to harm the group, is an interest that is insufficient to satisfy [heightened] rational basis review”. The reason is that the statute is rarely enforced, and thus “serves more as a statement of dislike and disapproval against homosexuals [for its own sake] than as a tool to stop criminal behavior”. When the criminalization of an activity reflects dislike for its own sake, it “raises the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected”.

Texas argues that the anti-sodomy law does not discriminate against homosexual persons, but against homosexual conduct.

However, homosexual conduct “is closely correlated with being homosexual”, and “there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal”.

If *Bowers* is not overruled, then state anti-sodomy statutes that apply to all persons (and not merely to homosexuals) would continue to pass constitutional muster under both the DP Clause and the EP Clause.

But O'Connor expressed confidence "that so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society".

Question: Is this confidence justified or misplaced?

SCALIA'S DISSENT

One problem with Kennedy's opinion is that its use of the *Casey* doctrine of *Stare Decisis* to overturn *Bowers* would also counsel the overturning of *Roe*, the central holding of which was itself re-affirmed in *Casey* (see below).

Another problem with Kennedy's opinion is that it does not explicitly state which test of constitutionality under the DP Clause (whether it be rational basis review or strict scrutiny) should be applied to the case. There are problems either way (see below).

SCALIA ON STARE DECISIS

The problem with Kennedy's application of the *Casey* doctrine of *Stare Decisis* to this case is that the doctrine counsels not just the overturning of *Bowers*, but also the overturning of *Roe* (which, oddly enough, was actually upheld in *Casey*).

Doctrinal Anachronism: Just as *Casey* "eroded the foundations" of *Bowers*, *Washington v. Glucksberg* (1997) "eroded the foundations" of *Casey* and *Roe*. In *Glucksberg*, the Court (in denying that the right to assistance in committing suicide is fundamental) assumed that the proper criterion of fundamentality derives from *Moore*, not from *Palko* (see lecture on *Bowers*): fundamental rights are those that are "deeply rooted in this Nation's history and tradition". Since the right to choose whether or not to terminate one's pregnancy is not "deeply rooted in this Nation's history and tradition", it follows that the basic holding of *Roe-Casey* (namely, that the right to choose whether or not to terminate one's pregnancy is fundamental) is inconsistent with *Glucksberg*.

{Note: This is an over-reading of *Glucksberg*, which considered both the *Palko* and *Moore* criteria of fundamentality in reaching its decision, though it may be true that the *Glucksberg* Court did not explain why the right to assistance in committing suicide is not "implicit in the concept of ordered liberty". What is clear from *Glucksberg* is not that the Court replaced the *Palko* criterion with the *Moore* criterion, but rather that the Court simply ignored the *Palko* criterion in order to arrive at what it took to be the correct result, which was to affirm that it is constitutionally legitimate under the DP Clause for a State to proscribe doctor-assisted suicide.}

{Further Note: Suppose Scalia is right to say that the foundations of *Roe* and *Casey* have been “eroded” by *Glucksberg*. Even so, by the *Casey* doctrine of *Stare Decisis*, it doesn’t follow that *Roe* and *Casey* should be overturned, unless there has been no individual or societal reliance on the rules stated in these decisions. But surely there has.}

Removal Without Inequity: Although there has been no “individual” reliance on *Bowers* since it was decided, the “‘societal reliance’ on the principles confirmed in *Bowers*... has been overwhelming”:

Lower Court decisions based on *Bowers*

The Supreme Court’s own reliance on *Bowers* in upholding Indiana’s public indecency statute in *Barnes v. Glen Theatre* (1991)

State laws against “traditional ‘morals’ offenses” (bigamy, adult incest, prostitution, masturbation (!), etc.)

{Note: The relevant question is not whether there has been “societal” reliance on *Bowers* of the kind cited by Scalia, but whether overturning *Bowers* would cause “significant damage to the stability of society”. Arguably, allowing couples to engage in sodomy in the privacy of their homes will not undermine the stability of society.}

SCALIA ON THE PROPER TEST

If the right to engage in (homosexual) sodomy is fundamental, then Strict Scrutiny applies. Otherwise, the proper test under the DP Clause is Rational Basis review.

Past cases support the *Moore* criterion of fundamentality: fundamental rights are those that are “deeply rooted in this Nation’s history and tradition”.

Kennedy’s opinion does not support the claim that the right to engage in (homosexual) sodomy satisfies the *Moore* criterion of fundamentality.

So Kennedy must think of himself as applying rational basis review. As Kennedy writes: “The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual”. But, if so, then the kind of rational basis review Kennedy is applying is “unheard-of” [see O’Connor’s discussion of a “heightened” form of rational basis review above] and “will have far-reaching implications beyond this case”, namely “the end of all morals legislation” (including legislative proscription of “fornication, bigamy, adultery, adult incest, bestiality, and obscenity”).

“If, as the Court asserts, the promotion of majoritarian sexual morality is not even a legitimate state interest, none of the above-mentioned laws can survive rational basis review”.

{Note: Past cases, including *Bowers* (!), also support the *Palko* criterion of fundamentality. It is the *Palko* criterion (not the *Moore* criterion) that supports the claim that the right to personal privacy is fundamental, and hence the claim (surprisingly not explicitly made by Kennedy) that the right to engage in (homosexual) sodomy is fundamental.}

{Further Note: Recall that the *Bowers* dissenters explicitly distinguished between sodomy and both adultery and incest. It might be possible for a State to justify proscribing “taboo” forms of activity (such as adultery and incest, but also polygamy, bestiality, and obscenity) on grounds that have nothing to do with the promotion of majoritarian standards of sexual “morality”.

SCALIA’S THEORY

The proper role of the Supreme Court is not to “take sides in the culture war”, but to “assur[e], as a neutral observer, that the democratic rules of engagement are observed”. Suppose, then, that a number of citizens “do not want persons who openly engage in homosexual conduct (???) as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home” because “they view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive”. If these citizens come, through democratic means, to form a majority, then they should be permitted to “criminalize homosexual acts”.

SCALIA’S WORRY

Kennedy’s opinion justifies striking down laws prohibiting gay marriage:

“If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), ‘when sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring’, [then] what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’?”.